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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

DONALD W. AND ANITA C. FAUSNER, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

Petition for a Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

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Donald W. and Anita C. Fausner, husband and wife, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The findings of fact and opinion of the Tax Court (Appendix A, *infra*, pp. 11-26), are reported at 30 T.C.M. 1187. The opinion of the court of appeals (Appendix B, *infra*, pp. 27-30) is reported at 472 F2d. 561 (1973).

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1973 (Appendix B, *infra*, p. 30). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the expense incurred by petitioners in transporting tools and equipment required by their employer between their home and place of work is deductible under Section 162 (a) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the Treasury Regulations on Income Tax (1954 Code) are set forth in Appendix C, *infra*, pp. 31-32.

STATEMENT

The facts are undisputed, and are presented here substantially as found by the Tax Court below (Appendix A).

Donald W. Fausner ("Donald") and Anita C. Fausner ("petitioners") are husband and wife, and have resided in Denton, Texas, since some time prior to the filing of the petitions in the Tax Court. During the periods here in issue, 1966 and 1967, they resided in Commack, New York, in the vicinity of New York City.

Throughout the periods here involved, Donald was employed as a commercial airline pilot by American Airlines ("American"). American issued to him American Airlines Operation Manuals, Flight Manuals, maps and charts, and it required Donald to have these aids with him while flying

American's aircraft. In accordance with these requirements, Donald carried a "flight kit bag" containing manuals, maps, charts, a logbook, a flashlight, pens and paper, all weighing 40 pounds. Also in accordance with American's requirements, Donald wore a pilot's uniform while working. The uniform could not be worn during layovers in other cities except while traveling between his hotel and the airplane. Therefore, in addition to the flight kit bag, Donald carried an overnight bag containing personal items and "street clothes" for use during layovers, which weighed approximately 20 pounds.

American did not provide lockable storage facilities for pilots' equipment or uniforms at either John F. Kennedy International Airport or LaGuardia Airport, Donald's two "home" airports. Consequently, Donald could not leave his equipment or uniforms at either of the airports. As a result, Donald transported himself, his flight kit bag and overnight bag to and from the airport by private automobile.

Donald worked irregular hours. Public transportation between Donald's home and place of employment was circuitous, inconvenient and undependable. In 1966, Donald made 88 trips from home to work and home again, traveling a total of 7,392 miles. In 1967, Donald made 173 such trips, totaling 14,532 miles. On their 1966 and 1967 returns, petitioners deducted $887.04 and $1,453.20, respectively, for expenses incurred in transporting the equipment and materials required in Donald's employment.

The Commissioner of Internal Revenue determined that the claimed expense of transporting the flight kit bag and

overnight bag was not deductible. The Tax Court held that petitioners' cost of transporting the manuals and equipment and the bags containing them was non-deductible since he also transported himself in the same vehicle.

The Court of Appeals for the Fifth Circuit affirmed the Tax Court, and in its opinion below expressly declined to follow the rule announced in the decisions of the Court of Appeals for the Second Circuit in *Sullivan v. Comm'r*, 368 F.2d 1007 (1966), and the Court of Appeals for the Seventh Circuit in *Tyne v. Comm'r*, 385 F.2d 40 (1967), *after remand*, 409 F.2d 485, *cert. denied* 396 U.S. 833, *on remand*, 29 T.C.M. 1398 (1970).

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted for three reasons:

1. The decision below directly conflicts with the earlier decision of the Court of Appeals for the Second Circuit in *Sullivan v. Comm'r*, 368 F.2d 1007 (1966), and the earlier decision of the Court of Appeals for the Seventh Circuit in *Tyne v. Comm'r*, 385 F.2d 40 (1967), *cert. den.* 396 U.S. 833, and only this Court can resolve the conflict;

2. The question presented is of general importance in the administration of the federal tax laws, and affects not only thousands of airline pilots, but many artisans, craftsmen and laborers required to transport tools and equipment to their places of work; and

3. The decision below denies the petitioners fair and consistent treatment by the Federal courts; petitioners

were allowed a deduction for the transportation of the same flight kit bag and overnight bag between the same residence in Commack, New York and John F. Kennedy and LaGuardia Airports for the taxable year 1965. *Donald W. Fausner*, 55 T.C. 620. The decision below denied an identical deduction for the taxable years 1966 and 1967 merely because the petitioners moved their residence from a state within the Second Judicial Circuit to a state within the Fifth Judicial Circuit.

I.
THE DECISION BELOW CONFLICTS WITH EARLIER DECISIONS OF THE COURTS OF APPEALS FOR THE SECOND AND SEVENTH CIRCUITS

The Court of Appeals for the Second Circuit was the first of the circuit courts to reach and decide the question presented here: whether the expenses of transporting tools and equipment to and from work should be deductible to a taxpayer who uses his vehicle to transport himself as well. In an opinion written by Chief Judge Lumbard in *Sullivan v. Comm'r*, 368 F.2d 1007 (1966), the court held that such transportation expenses should be apportioned between the non-deductible cost of transporting the workman and the deductible cost of transporting his tools:

> "The Commissioner . . . urges that the rule above be that the taxpayer may deduct reasonable driving expenses if he can prove that he would not have driven his automobile to work if it had not been necessary to carry his tool bag.*** We agree with the rule suggested by the Commissioner, as far as it goes. But we hold that the deductibility of expenses of transporting tools to and from work should not be so narrowly limited. Even if taxpayer would have driven to and from work had it not been necessary to transport his tools, he ought to be allowed

> to deduct that portion of his reasonable driving expense which is allocable to the transportation of tools." 368 F.2d at 1008.

One year later, the Court of Appeals for the Seventh Circuit reached the same apportionment result in *Tyne v. Comm'r*, 386 F.2d 40 (1967), *after remand*, 409 F.2d 485, *cert. denied* 396 U.S. 833, *on remand* 29 T.C.M. 1398 (1970). After discussing the *Sullivan* decision, the Court stated:

> ". . . we agree with the Second Circuit Court of Appeals in *Sullivan* – 'Even if taxpayer would have driven to and from work had it not been necessary to transport his tools, he ought to be allowed to deduct that portion of his reasonable driving expenses which is allocable to the transportation of tools.'" 385 F.2d at 41.

The decision below in this case rejected the apportionment rule of the Second and Seventh Circuits, and denied the petitioners any deduction for the cost of transporting the manuals, maps, charts, logbooks, tools and clothing contained in the flight kit bag and overnight bag. In doing so, the court below expressly recognized that it was creating a conflict with the Second and Seventh Circuit decisions:

> "The precise point at issue in this case has been addressed by two other circuits, Sullivan v. Comm'r, 368 F.2d 1007 (2d Cir. 1966), and Tyne v. Comm'r, 385 F.2d 40 (7th Cir. 1967), *after remand*, 409 F.2d 485, *cert. denied*, 396 U.S. 833, 90 S.Ct. 88, 24 L.Ed. 83 (1969), *on remand*, 29 T.C.M. 1398 (1970). Both of those circuits concluded that some allocable portion of the expenses incurred should be allowed as a deduction as an ordinary and necessary business expense. With all deference to those circuits, we decline to follow the rule announced in their decisions."

The writ should be granted because only this Court can resolve the conflict between the decisions of the Courts of Appeals for the Second and Seventh Circuits, and the decision of the Court of Appeals for the Fifth Circuit below.

II.
THE QUESTION PRESENTED IS OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF THE FEDERAL TAX LAWS, AND CURRENTLY BURDENS THE LOWER FEDERAL COURTS

The question presented here is of importance to thousands of airline pilots as well as tens of thousands of independent artisans, craftsmen and laborers throughout the country, all of whom must carry tools, equipment and other material required by their employers.

The courts below are now divided on this issue, with the Second and Seventh Circuits favoring apportionment of transportation expenses, and the Fifth Circuit and Tax Court denying any deduction at all where tools and equipment are transported by a taxpayer who wishes to take his vehicle to work. The result of this judicial conflict has been an uneven administration of the tax law between the judicial circuits. Many poor workmen cannot afford access to the courts, and those who can, find that the amount of the tax in dispute will not justify the lawyers fees and court costs necessary for an adequate presentation of the issue. This case, for example, was presented *pro se* at trial.

The uneven and troubled administrative treatment of this issue is reflected in an outpouring of recently-decided cases. See, for example, *Howard Gilberg*, 55 T.C. 611, (1971), *Robert A. Hitt*, 55 T.C. 628 (1971), *Arnold T. Anderson*, 55 T.C. 756 (1971); *Albert E. Luetzow*, 32 T.C.M., Dec. 31, 896 (M) (1973); *Frank W. Coker*, 31 T.C.M., Dec. 31, 325 (M) (1972); *Samuel D. Woolsey*, 31 T.C.M., Dec. 31, 254 (M) (1972); *John E. Scott*, 30 T.C.M. 680 (1971); *Stanley E. Bailey*, 30 T.C.M. 460

(1971); *Gregorio Castillo*, 30 T.C.M. 354 (1971), appeal pending in the Ninth Circuit June 1, 1971; *Gerald F. B. Boerner*, 30 T.C.M. 240 (1971). This case is typical of its kind, and is a proper cause in which to place this issue at rest.

III.
THE DECISION BELOW DENIES THE PETITIONERS FAIR AND EQUAL TREATMENT

In January of 1970, the Tax Court had before it questions growing out of the 1965 income tax return of these same petitioners, Donald W. and Anita C. Fausner. That case presented, *inter alia*, the same issue now involved here for the two taxable years 1966 and 1967: whether the petitioners were entitled to deduct the cost of transporting Donald's flight kit bag and overnight bag from his home in Commack to the major airports in New York City and home again. The Tax Court acknowledged in that case that any appeal of an adverse decision would be taken to the Second Circuit (the petitioners still resided within the vicinity of New York), and recognized that under its decision in *Jack E. Golsen*, 54 T.C. 742 (1970), affirmed on another issue, 445 F.2d 985 (10th Cir. 1971), that it was required to follow the Second Circuit rule of apportionment announced in the *Sullivan* case.

Less than ten months later, in October, the Tax Court denied the *same* taxpayers the *same* deduction in identical circumstances merely because the Fausners had moved their place of residence from New York (in the Second Judicial Circuit) to Texas (in the Fifth Judicial Circuit). The Tax Court ignored the *Sullivan* decision and the

Seventh Circuit's *Tyne* decision as well as their own earlier decision involving this same taxpayer. The Tax Court was bent on developing its own rule in conflict with the Second and Seventh Circuits. That Tax Court was affirmed below, and the petitioners were denied the uniform treatment which Congress intended to provide under the Internal Revenue Code, merely because of their geographic movement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dallas, Texas 75202
Counsel for Petitioners

April 13, 1973

APPENDIX A

UNITED STATES TAX COURT

Donald W. and Anita C. Fausner v. Commissioner.
Docket Nos. 4754-69, 5590-69.
Filed October 28, 1971.

Donald W. Fausner, *pro se* John W. Dierker, for the respondent.

Memorandum Findings of Fact and Opinion

DAWSON, Judge: In these consolidated cases the respondent determined the following Federal income tax deficiencies against the petitioners:

Year	Amount
1966	$1,424.99
1967	3,699.68

Concessions have been made by the parties and will be given effect in the Rule 50 computations. Eight issues, however, remain for decision. They are: (1) Whether petitioners are entitled to an additional deduction for medicine and drugs; (2) whether petitioners are entitled to a deduction for the cost of the huband's transportation between his residence and place of work; (3) whether petitioners are entitled to a deduction for the cost of certain insurance policies; (4) whether petitioners are entitled to a deduction for the cost of their son's dress uniforms; (5) whether petitioners are entitled to a deduction for the cost of certain items of clothing and equipment used by the husband in connection with his job as an airline pilot; (6) whether petitioners are entitled to an additional deduction for telephone expenses; (7) whether petitioners are entitled to a deduction in the amount of $141.20 for an alleged char-

itable contribution; and (8) whether petitioners are entitled to a deduction for the cost of a typewriter and books purchased by the husband.

Findings of Fact

The parties have stipulated certain facts. These stipulations and the exhibits attached thereto are incorporated herein by this reference.

Donald W. Fausner ("Donald") and Anita C. Fausner are husband and wife. At the time they filed their petition herein (and since June 21, 1968) petitioners resided in Denton, Texas. They filed joint Federal income tax returns for the calendar years 1966 and 1967. As of the date of trial in May 1971, Mr. and Mrs. Fausner had six children ranging in age from 6 to 16.

Medical and Dental Expenses for 1966 and 1967

On their 1966 return, petitioners itemized medical and dental expenses amounting to $1,328.81. Included in this total was $960 labeled "Misc. at $2.50 per week for 8 persons." The $960 expenditure is unsubstantiated. Similarly, on their 1967 return, petitioners entered in Part IV, line 2, a "[t]otal cost of mdicine and drugs" amounting to $1,032.50,[1] but they were able to substantiate only approximately three/eighths of that amount. Respondent agreed at trial to allow $501.40. The remaining $531.10 is unsubstantiated.

Transportation to and from Work During 1966 and 1967[2]

Donald is employed as a commercial airline pilot by American Airlines ("American"). During the years in ques-

[1] Petitioners did not attach an itemized list of medical and dental expenses to their 1967 return, as they did to their 1966 return.

[2] The facts pertaining to this issue are almost identical to the facts in an earlier case involving petitioners' taxable year 1965. *Donald W. Fausner* [Dec. 30,606], 55 T. C. 620 (1971).

tion Donald traveled to and from his place of employment by private automobile. On their 1966 and 1967 returns, petitioners deducted $887.04 and $1,453.20, respectively, for transportation expenses incurred traveling to and from work, relying upon section 162 of the Internal Revenue Code of 1954.[3]

As a condition of his employment, Donald had to know certain American Airlines and Federal Aviation Administration rules and regulations. American issued to him American Airlines Operation Manuals, Flight Manuals, maps, and charts. American required that the manual, maps, and charts be kept up to date with revisions which it provided from time to time. It also required Donald to have these aids with him while piloting. In accordance with these requirements, Donald carried a "flight kit bag" containing manuals, maps, charts, a logbook, a flashlight, pens, and paper and weighing 40 pounds. Also in accordance with American's requirements, Donald wore a pilot's uniform while working; by choice, he wore the uniform while commuting to and from the "home" airports. The uniform could not be worn during layovers in other cities except while traveling between his hotel and the airplane. Therefore, in addition to the flight kit bag, Donald carried an overnight bag containing personal items and "street clothes" for use during layovers.

American did not provide lockable storage facilities for pilots' equipment or uniforms at either John F. Kennedy International Airport ("JFK") or LaGuardia Airport, Donald's two "home" airports. Consequently, Donald could not leave his equipment or uniforms at either of the airports.

[3] All statutory references are to the Internal Revenue Code of 1954, as amended.

Donald worked irregular hours. It is unclear whether he was "on call" 24 hours a day, 365 days a year. Public transportation between Donald's home and place of employment is circuitous, inconvenient, and undependable.

Even if Donald had not needed to take his flight kit bag and overnight bag with him on his flights, he would still have driven his automobile to work. He incurred no additional expense by reason of transporting his flight kit and overnight bag.

In 1966, Donald made 88 trips from home to work and home again, traveling a total of 7,392 miles. In 1967, Donald made 173 such trips, totaling 14,532 miles.

On their 1967 return petitioners also deducted the cost of Donald's traveling from home to JFK and LaGuardia Airports for various work-related events, such as, physical examinations by company doctors, "revision checks," "proficiency checks," "recurrent training," and "route qualifications." Petitioners characterized this cost as an educational expense or, alternatively, an employee business expense.

Insurance Premiums

In 1967, petitioners paid and deducted as medical expenses the following:

Insurer	Amount
Mutual of New York Life Insurance Co. (MONY)	$169
Harvey Watts, Inc.	161
Massachusetts Casualty	159
Pilots Mutual Aid	98

These policies do not provide for the payment of medical services but instead for disability and/or death payments. The MONY and the Massachusetts Casualty policies contain a provision for the waiver of premiums upon the occurrence of events of described therein.

Son's Dress Uniforms

Petitioners' son attended a military academy on Long Island. His "normal workday uniform" was provided by the school. His dress uniforms were paid for by his parents and worn over a four-year period.

Petitioners paid $400 to the academy for "registration and uniforms." One hundred dollars of this amount was paid in 1966 and $100 in 1967. The record does not show what percentage of these yearly amounts was paid for uniforms as opposed to registration fees.

Miscellaneous Items of Clothing and Equipment

American Airlines requires Donald to carry numerous items of flight equipment. Petitioners deducted from their 1967 gross income the total cost of this equipment. Respondent disallowed the following items:

Item	Cost
Flashlight	$ 9.98
Pens	17.95
Sunglasses	5.94
Black gloves	5.98
Black shoes, black socks, and laces	37.21
Overnight paraphernalia, e. g., shaving kit	36.58

All of the disallowed items are suitable for ordinary, at-home use. Not all of these items had to be stored in Donald's flight kit bag.

Telephone Expenses

Although it is unclear for what length of time Donald was "on call" 24 hours a day, his employment as an airline pilot required him to have a telephone in his home. Petitioners' telephone bill for 1967 amounted to $224.85. They deducted the full $224.85 as an employee business expense. Respondent allowed $58.14, one-half of the "basic rate" of $116.28.

Alleged Charitable Contribution

Three of petitioners' children attended Christ the King School, a parochial school, in 1967. The school was operated by Christ the King Church.

In 1967, Donald paid by check the following amounts to the order of Christ the King Church:

Month	Amount
January	$ 6.00
February	6.00
February	18.35
March	6.00
April	6.00
May	6.00
August	6.00
September	30.56
October	10.00
November	10.00
	$104.91[4]

[4] For some unknown reason, the parties treat this total as equaling $141.20 rather than $104.91. Since we have copies of the checks before us, we will rely upon our own figures.

All of these checks are endorsed for deposit by Christ the King School. These payments were tuition payments.

Typewriter and Books

Donald purchased in 1967 a portable typewriter for $71. He used it to type synopses of articles appearing in aviation magazines. A typewriter was not required by his employer. In the same year, Donald also purchased a tax text from Sears for $22.73. He used the text to prepare his Federal income tax return. Petitioners deducted the total cost of both items in 1967, and respondent disallowed the cost for them.

Opinion

1. *Medical and dental expenses for 1966 and 1967.* Respondent has agreed that petitioners are entitled to report $501.40 as a medicine and drugs expense in 1967. The amount which they are entitled to deduct in 1966 remains in dispute: Petitioners claim $960 in addition to the $368.81 which respondent has allowed.

The question, then, is whether the $960 qualifies under section 213. Section 213, in relevant part, provides:

Sec. 213. Medical, dental, etc., expenses.

(a) Allowance of Deduction. – There shall be allowed as a deduction the following amounts, not compensated for by insurance or otherwise –

(1) The amount by which the amount of the expenses paid during the taxable year (reduced by any amount deductible under paragraph (2) for medical care of the

taxpayer, his spouse, and dependents (as defined in section 152) exceeds 3 percent of the adjusted gross income, and

(2) an amount (not in excess of $150) equal to one-half of the expenses paid during the taxable year for insurance which constitutes medical care for the taxpayer, his spouse, and dependents.

(b) Limitation with Respect to Medicine and Drugs. — Amounts paid during the taxable year for medicine and drugs which (but for this subsection) would be taken into account in computing the deduction under subsection (2) shall be taken into account only to the extent that the aggregate of such amounts exceeds 1 percent of the adjusted gross income.

Section 1.213-1(e)(2), Income Tax Regs., provides:

Sec. 1.213-1(e)(2) *Medicine and drugs.* The term "medicine and drugs" shall include only items which are legally procured and which are generally accepted as falling within the category of medicine and drugs (whether or not requiring a prescription). Such term shall not include toiletries or similar preparations (such as toothpaste, shaving lotion, shaving cream, etc.) nor shall it include cosmetics (such as face creams, deodorants, hand lotions, etc., or any similar preparation used for ordinary cosmetic purposes) or sundry items.

See also S. Rept. No. 1622, 83d Cong., 2d Sess., p. 219 (1954); 5 Mertens, Law of Federal Income Taxation, Sec. 31A.07-08.

Petitioners estimated that their "out-of-pocket" medical expenses averaged $10 per month, per person, or $80 per

month for the entire family. This estimate is exclusive of doctors' and dentists' bills.

Petitioners have neither substantiated their claim for an additional deduction above and beyond that allowed by respondent nor demonstrated that their estimate in reasonable. Moreover, they have not shown that only "medicine and drugs," as defined above, were included in their estimate and sundry items such as cosmetics and vitamins were excluded.

The additional deduction claimed is, therefore, disallowed.

2. *Transportation to and from work during 1966 and 1967.* The question is whether petitioners are entitled to deduct $887.04 in 1966 and $1,453.20 in 1967 for transportation expenses incurred by Donald traveling to and from work. Respondent rests his case upon the Court's decision in *Robert A. Hitt* [Dec. 30,607], 55 T. C. 628 (1971). Petitioners argue that the expenses fall within section 162(a), citing *Sullivan v. Commissioner* [67-1 USTC ¶9104], 368 F. 2d 1007 (C. A. 2, 1966), and *Donald W. Fausner* [Dec. 30,606], 55 T. C. 620 (1971).

The issue in all three of the cited cases is essentially the same, viz., whether a taxpayer driving to work and carrying his tools or equipment is entitled to deduct a portion or all of his transportation expenses.

Our prior opinion in *Donald W. Fausner, supra,* dealt with these same taxpayers' transportation expenses for the calendar year 1965. In it we followed the Second Circuit's

decision in *Sullivan*[5] since the Fausners resided in the Second Judicial Circuit when they filed their petition therein. *Jack E. Golsen* [Dec. 30,049], 54 T. C. 742 (1970), affirmed [71-2 USTC ¶ 9497] 445 F. 2d 985 (C. A. 10, 1971) without considering this issue. Thus we held that the portion of Donald's costs of transportation between home and work which was was reasonably attributable to the transportation of his flight kit bag and overnight bag was deductible as a business expense.

Hitt was decided the same day that *Fausner* was decided. *Hitt*, however, was appealable to the Fifth Judicial Circuit and the United States Court of Appeals for the Fifth Circuit had not previously decided the commuting expense issue. In *Hitt*, we held that since the taxpayer would have used his automobile in any event to travel to and from work, he was not entitled to a deduction for transporting tools or equipment. See *Robert A. Hitt*, *supra* at 633, where we said:

[5] *Sullivan* involved a construction worker who carried a bag of tools with him as he traveled from home to various job locations. The United States Court of Appeals for the Second Circuit allowed a deduction for that part of the cost of commuting allocable to the transportation of the tools. The Court of Appeals added that even if the taxpayer would have driven to and from work had it not been necessary to transport his tools, he ought to be allowed the deduction.

Cases in the Seventh Judicial Circuit follow the *Sullivan* allocation approach where the taxpayer would have driven his automobile in any event. *Tyne v. Commissioner* [67-2 USTC ¶9721], 385 F. 2d 40 (C. A. 7, 1967), reversing a Memorandum Opinion of this Court [Dec. 28,124(M)], but allow a 100 percent deduction where the taxpayer would not have driven but for the necessity of transporting his tools. *Tyne v. Commissioner* [69-1 USTC ¶9320], 409 F. 2d 485 (C. A. 7, 1969), reversing a Memorandum Opinion of this Court [Dec. 28,124(M)]. *See Robert A. Hitt* [Dec. 30,607], 55 T. C. 628, 631-32 (1971).

> [T]he need to transport equipment would not have burdened the taxpayer with any additional expense and the entire cost of going to and returning from work is a personal commutation expense. A deduction for transporting heavy, bulky, unwieldy and cumbersome tools and equipment should be allowed only to the extent that the transporting of such items causes a taxpayer to incur expenses above and beyond those he would otherwise incur in commuting.

The reason for the opposite results in *Fausner* and *Hitt* is explained in Chief Judge Drennen's concurring opinion in *Hitt* and in the Court's opinion in *Arnold T. Anderson* [Dec. 30,652], 55 T. C. 756 (1971). In brief, the reason is that the Tax Court decided in *Jack E. Golsen, supra,* to apply the rule of the controlling judicial circuit if there is one which is on point, and *Sullivan* was on point with *Fausner.* But in this case, as in *Hitt,* we are free to follow our own judgment.

Accordingly, we hold that the taxpayers' cost of transporting both himself and his bags to and from work was a personal expense under section 262[6] rather than an employee business expense under section 162. *Robert A. Hitt, supra;*[7] *Harold Gilberg* [Dec. 30,605], 55 T. C. 611 (1971). We adhere to the view, expressed in *Hitt,* that a taxpayer should not be permitted to circumvent the "commuter rule" by simply throwing some tools or other equipment such as a flight kit bag into his car each time he drives to work. *Robert A. Hitt, supra* at 633. The *Sullivan* rule only encourages employees to lobby with employers against the

[6] SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.
Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

[7] See also *Clarence H. O'Donnell* [Dec. 25,498(M)], T. C. Memo. 1962-114.

providing of lockable storage space. The latter rule also creates a problem of how to allocate the cost of transporting the tools or equipment. Cf. *Arnold T. Anderson, supra.* We disallow this deduction for both years.

With respect to the claimed deduction for the cost of Donald's traveling to work for such things as "recurrent training," we hold that it is not allowable as an education expense. The various events which Donald attended or participated in were in fact simply part of his job. Futhermore, the deduction is not allowable as a business expense because, as indicated above, commuting expenses are personal expenses. *Robert A. Hitt, supra.*

3. *Insurance premiums.* Petitioners claim that the four premium payments, totaling $587, which they made in 1967 are deductible as medical expenses. Respondent denies their claim on the ground that section 213, as amended in 1965, and the regulations promulgated thereunder do not permit the deductions. Section 213, as amended by the Social Security Amendments Act of 1965, 74 Stat. 133; section 1.213-1(e)(4), Income Tax Regs., as amended by T. D. 6985, 1969-1 C. B. 66, 68-71. Petitioners do not contest the validity of the regulations.

Section 213 and the applicable regulations make clear that premiums which are paid to insure against disability or death are not deductible. If such premiums are paid in part to insure against disability or death and in part to cover medical care expenses, they are deductible only if the charge for medical care coverage is separately stated and only to the extent of such charge. The regulations also provide as follows:

[A]mounts will be considered payable for other than medical care under the contract if the contract provides for the waiver of premiums upon the occurrence of an event. [Sec. 1.213-1(e)(4), Income Tax Regs.]

The policies in question fail to meet such criteria. They all provide for some sort of disability payment; none separately states a charge for medical care coverage; two of the policies contain waiver-of-premium provisions.

The premiums are personal, living, or family expenses under section 262, and hence nondeductible. *Newi v. Commissioner* [70-2 USTC ¶ 9669], 432 F. 2d 998 (C. A. 2, 1970), affirming a Memorandum Opinion of this Court [Dec. 30,423(M)]; *John A. Guglielmetti* [Dec. 24,664], 35 T. C. 668 (1961).

4. *Son's military uniforms.* Petitioners seek to deduct amounts which they say they spent for their son's dress uniforms. Their son was a student at a military academy in 1966 and 1967.

On their 1967 return, petitioners list the item as a "contribution" to "LaSalle School (non-profit)." In their briefs, they do not offer any explanation for their action, present any legal theory, or point to any section of the Code or regulations.

Without deciding how much was actually expended for dress uniforms, we hold that all such expenditures are nondeductible. Section 262.

5. *Miscellaneous items of clothing and equipment.* Respondent has allowed deductions for parts of Donald's uniform which are not suitable for ordinary use, such as, shirts, insignia, hat, jacket, and trousers. Respondent has disallowed deductions for items which he thinks are suit-

able for "street" or "home" use, such as, an ordinary flashlight, sunglasses, black socks, and pens.

In order to prove that they are entitled to the disallowed deductions, petitioners must show (1) that the items were required or essential for employment and (2) that they were not suitable for ordinary use. *Donnelly v. Commissioner* [59-1 USTC ¶ 9196], 262 F. 2d 411 (C. A. 2, 1959), affirming 28 T. C. 1278 (1957). Petitioners meet the first requirement but not the second. In fact, Donald admitted at trial that he occasionally used some of these items when not "on the job." Accordingly, we agree with respondent's disallowance of these deductions.[8]

6. *Telephone expenses.* This issue, as presented in this case, is strictly factual: How much of their home telephone expenses should petitioners be allowed to deduct? Respondent is willing to allow one-half of the "basic rate." Petitioners hold out for the whole amount of the telephone bill.

We agree with the parties that the expense is deductible, *Louis M. Roth* [Dec. 18,824], 17 T. C. 1450 (1952), but we think respondent is too generous. We note, first, that petitioners would have had a telephone in their house regardless of American Airlines' requirements and, second, that seven members of the Fausner family besides Donald used the telephone for personal calls. We refrain, however, from lowering respondent's figure.

7. *Alleged charitable contribution.* The question is whether certain payments made in 1967 by the petitioners to the order of Christ the King Church but endorsed by Christ the King School were charitable contributions or

[8] For a recent decision, see *Harris L. Jackson* [Dec. 30,281(M)], T. C. Memo. 1970-227.

tuition payments. We find that they are the latter. The Fausners had three children enrolled in Christ the King School. They paid no other amounts as tuition. The money was used to maintain the school premises. See and compare *Harold DeJong* [Dec. 24,997], 36 T. C. 896 (1961), affd. [62-2 USTC ¶ 9794] 309 F. 2d 373 (C. A. 9, 1962).

8. *Typewriter and books.* In 1967, petitioners purchased a typewriter and a tax text from Sears. Since the typewriter was not a requirement of his employment, its cost is nondeductible. *E. g., Louis M. Roth, supra* (work clothes); *Ronald D. Kroll* [Dec. 28,864), 49 T. C. 557 (1968) (educational expenses). The cost of the tax text is deductible under secti[illegible] 1.212-1(1), Income Tax Regs., and the cases dealing with the [illegible]st of preparing income tax returns, *e. g., David L. Loew* [Dec. 15,270], 7 T. C. 363 (1946) and *Philip D. Armour* [Dec. 15,010], 6 T. C. 359 (1946).

Finally, petitioners claim deductions for other "educational books" of $159.95 ($253.68 minus (cost of typewriter plus cost of tax text)). This claim is unsubstantiated by the record and, therefore, disallowed.

Because of concessions and in accordance with the conclusions reached herein,

Decisions will be entered under Rule 50.

APPENDIX B

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 72-1739

DONALD W. FAUSNER AND ANITA C. FAUSNER,
Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from a Decision of the Tax Court of the United States (Texas Case)

(January 17, 1973)

Before GODBOLD, DYER and CLARK, Circuit Judges.

PER CURIAM: Donald W. Fausner, a commercial airline pilot employed by American Airlines, regularly traveled by private automobile from his home to his place of employment and back again, a round trip distance of

approximately eighty-four miles. When Fausner traveled to or from a flight assignment he carried a forty pound flight-kit bag (containing flight manuals, maps, charts, etc.) and a twenty pound overnight bag (containing personal items and clothing). The record shows that it was a practical necessity that the bags be transported to and from each job assignment. The record further indicates that Fausner would have driven to work even if it had not been necessary to carry the bags, since no convenient public transportation was available.

Fausner sought to deduct the entire cost of commuting the forty-two miles between his home and his place of employment. To avoid the well-established rule that commuting expenses are nondeductible personal expenses, Fausner argued in the Tax Court that his automobile expenses were incurred to transport his flight bag and overnight bag and thus constituted ordinary and necessary business expenses. The Tax Court disallowed the deduction *in toto*.[1] We affirm.

The precise point at issue in this case has been addressed by two other circuits, *Sullivan v. Comm'r*, 368 F.2d 1007 (2d Cir. 1966), and *Tyne v. Comm'r*, 385 F.2d 40 (7th

[1] Donald W. Fausner, 30 T.C.M. 1187 (1971). Fausner has prevailed in the Tax Court on this same issue as to other taxable years, Donald W. Fausner, 55 T.C. 620 (1971). The apparently contradictory decisions in the Tax Court are explained by the Court's policy of following the announced decisions of the Circuit Court of Appeals to which the case would be appealable. 30 T.C.M. at 1190. Fausner changed his residence from a state within jurisdiction of the Second Circuit (which had decided the *Sullivan* case, *infra*) to a state within the jurisdiction of the Fifth Circuit. See 30 T.C.M. at 1190.

Cir. 1967), *after remand*, 408 F.2d 485, *cert. denied*, 396 U.S. 833, 90 S.Ct. 88, 24 L.Ed. 83 (1969), *on remand*, 29 T.C.M. 1398 (1970). Both of those circuits concluded that some allocable portion of the expenses incurred should be allowed as a deduction as an ordinary and necessary business expense. With all deference to those circuits, we decline to follow the rule announced in their decisions. This is not a situation where a proper allocation can be made by any analytical determination of actual cost of the deductible component. For example, the cost of maintaining an office in a home is subject to an approximation on the basis of the floor space utilized, and an attorney's fee can be allocated to deductible and nondeductible segments on the basis of the actual time involved for the various legal services. However, no rational basis has been suggested for allocation between the nondeductible commuting component and the deductible business component of the total expense here. Any attempt at such allocation in this situation would be no more than a random speculation.

The short answer is that since he introduced no evidence that he incurred *any* expense in excess of nondeductible commuting expense in transporting his two bags, Fausner failed to carry the burden of establishing his right to the deduction claimed. By the same token, because the taxpayer has failed to establish a factual basis for any allocation we cannot conclude that the Commissioner's determination is arbitrary. *Cf. Tyne, supra*, 29 T.C.M. at 1400-01.

We are not persuaded by the argument that our characterization of the expenses incurred by Fausner as

commuting expenses is itself no more than a guess. The best expression of this line of reasoning is contained in Judge Sterrett's concurring opinion in Robert A. Hitt, 55 T.C. 628 (1971):

> . . . It would be just as logical to hold to the contrary; namely, that the commuting expense loses its nondeductible character by reason of its association with the deductible expense incurred by one carrying the tools of his trade to work. Under this reasoning one end results in an out-of-pocket expenditure and the other end in none. But which end is up? A futile quest. An all or nothing approach ignores the realities of the situation and defies logic. . . .

On the facts of this case we have no difficulty concluding "which end is up". One primary aim of the income tax statute is to ensure that taxpayers similarly situated bear similar burdens. Since the record shows that Fausner would have driven his car to and from his place of employment anyway, we cannot find that he is entitled to what would amount to special relief which would distinguish him from other taxpayers because of the mere fortuity that he placed the bags he was required to carry in the trunk of his commuting vehicle. Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense. This common burden cannot be negated for a particular taxpayer by the happenstance that he must carry incidentals of his occupation with him.[2]

The decision of the Tax Court is

AFFIRMED.

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[2] Nothing in this opinion is intended to prevent the deduction of expense in excess of ordinary commuting expenses which can be shown to have been incurred in transporting job-required tools and materials to or from the work site. *See* Rev. Rul. 63-100, 1963-1 C.B. 34.

APPENDIX C

Section 162 of the Internal Revenue Code.

SEC. 162. TRADE OR BUSINESS EXPENSES.

[Sec. 162(a)]

(a) IN GENERAL. – There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including –

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

Treasury Regulation, § 1.162-2(e)

(e) Commuters' fares are not considered as business expenses and are not deductible.

Treasury Regulations, § 1.162-17(a). Reporting and substantiation of certain business expenses of employees.

(a) *Introductory*. The purpose of the regulations in this section is to provide rules for the reporting of information on income tax returns by taxpayers who pay or incur ordinary and necessary business expenses in connection with the performance of services as an employee and to furnish guidance as to the type of records which will be useful in compiling such information and in its substantiation, if required. The rules prescribed in this section do not apply to expenses paid or incurred for incidentals, such as office supplies for the employer or local transportation in connection with an errand. Employees incurring such incidental expenses are not required to provide substantiation for such amounts. The term "ordinary and necessary business expenses" means only those expenses which are ordinary and necessary in the conduct of the taxpayer's business and are directly attributable to such business. The term does not include nondeductible personal, living or family expenses.

CERTIFICATE OF SERVICE

It is hereby certified that service of this petition for writ of certiorari has been made on all parties required to be served under Rule 33 of the Revised Rules of The Supreme Court of the United States by depositing three (3) copies thereof on this 13th day of April, 1973, in an envelope, with air mail postage prepaid, addressed to him as follows:

Hon. Erwin N. Griswold
Solicitor General
Department of Justice
Washington, D.C. 20230

Robert Edwin Davis

ROBERT EDWIN DAVIS
Counsel for petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1396

DONALD W. AND ANITA C. FAUSNER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner[1] is a commercial airline pilot who, during the years in question, regularly utilized his private automobile to transport himself from his home to his principal place of employment and back again, a round-trip distance of approximately 84 miles. Each time petitioner made this trip he carried a flight kit bag weighing 40 pounds and an overnight bag weighing 20 pounds. On his federal income tax returns for 1966 and 1967 petitioner, relying principally on the fact that the circumstances of his job required him to carry the flight bag and overnight bags to and from work, deducted as ordinary and necessary business expenses under Section 162(a) of the Internal

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[1] References to "petitioner" are to Donald W. Fausner. Anita C. Fausner is a party here only because joint income tax returns were filed for the years in issue.

Revenue Code of 1954 the entire cost of driving his automobile to work. The Tax Court denied the entire deduction; it reasoned that commuting costs are personal and nondeductible (see *Commissioner* v. *Flowers,* 326 U.S. 465), that, as the court found, petitioner would have used his automobile to commute to work even if he were not required to carry the bags, and that the carrying of the bags should not convert the personal commuting expense to a deductible business expense. (Pet. App. A, pp. 11-25.) The court of appeals affirmed. (Pet. App. B, pp. 27-30.)

The courts below correctly concluded, in our view, that since petitioner produced no evidence to show that he incurred any expense as a result of carrying the bags in excess of what he would have incurred had he not been required to carry the bags, he was not entitled to a deduction. Noting that its opinion did not preclude the deduction of "expense in excess of ordinary commuting expenses which can be shown to have been incurred in transporting job-required tools and materials to or from the work site," the court of appeals reasoned that (Pet. App. A, p. 30):

> One primary aim of the income tax statute is to ensure that taxpayers similarly situated bear similar burdens. Since the record shows that Fausner would have driven his car to and from his place of employment anyway, we cannot find that he is entitled to what would amount to special relief which would distinguish him from other taxpayers because of the mere fortuity that he placed the bags he was required to carry in the trunk of his commuting vehicle.

Though we believe that the result reached by the courts below is correct, we agree with petitioner that the decision is in direct conflict with the decisions of the Second and Seventh Circuits. *Sullivan* v. *Commissioner,* 368 F. 2d 1007 (C.A. 2), after remand, 69-2 U.S.T.C., par. 9448

(C.A. 2), certiorari denied, 396 U.S. 827,[2] and *Tyne* v. *Commissioner*, 385 F. 2d 40 (C.A. 7), after remand, 409 F. 2d 485 (C.A. 7), certiorari denied, 396 U.S. 833, on remand, 29 T.C.M. 1398, affirmed, 468 F. 2d 913 (C.A. 7). In these cases, as here, taxpayers claimed deductions for commuting expenses they would have incurred in any event, on the ground that they were required to carry tools to work which necessitated the use of the mode of transportation whose cost they sought to deduct. The courts of appeals in both of these cases held that deduction of some allocable portion of the expenses incurred should be allowed as an ordinary and necessary business expense.[3]

We also agree with petitioner that resolution of the issue in this case is of significant importance to the administration of the federal tax laws. The factual situation in which a taxpayer commutes to work carrying heavy tools with him is doubtless a very common one. There are now pending 140 cases in docketed status and 23 cases in non-docketed status in which taxpayers seek deductions for the transportation of tools and equipment in their private auto-

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[2] The Second Circuit has recently affirmed its position on this issue. *Coker* v. *Commissioner*, Nos. 72-2309 and 73-1011, decided May 14, 1973.

[3] Indeed, as petitioner points out (Pet. 8-9) the Tax Court in prior litigation involving his taxable year 1965 held, on substantially identical facts as are presented by the instant litigation, that he was entitled to a partial deduction for that portion of his driving expenses theoretically allocable to the transportation of his bags. See *Fausner* v. *Commissioner*, 55 T.C. 620. As the court below noted (Pet. App. B, p. 28), the reason for the apparently contradictory results in the Tax Court is that petitioner changed his residence from a state within the jurisdiction of the Second Circuit (which had decided the *Sullivan* case, *supra*) to a state within the jurisdiction of the Fifth Circuit, which had not previously considered the issue. See *Golsen* v. *Commissioner*, 54 T.C. 742, affirmed, 445 F. 2d 985 (C.A. 10).

mobiles to and from work.[4] Furthermore, the approach adopted by the Second and Seventh Circuits, in which the commuting expenses are required to be allocated in part to the carrying of tools, would, if upheld, create a substantial burden on the Internal Revenue Service and the courts which decide questions of federal tax law.

Accordingly, we concur in petitioner's suggestion that uniform administration of the tax law requires that the question presented in this case be clarified, and do not oppose the petition for certiorari.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

MEYER ROTHWACKS,
ROBERT S. WATKINS,
Attorneys.

MAY, 1973.

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[4] The question presented by this case is now pending in the Ninth Circuit. *Castillo* v. *Commissioner,* 30 T.C.M. 354, on appeal to C.A. 9, No. 71-1922.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-1396

DONALD W. AND ANITA C. FAUSNER, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for Writ of Certiorari
To The United States Court of Appeals
From the Fifth Circuit

PETITION FOR REHEARING

To the Honorable Justices of the Supreme Court of the United States:

Petitioners, Donald W. and Anita C. Fausner, present this petition for a rehearing in the above entitled cause, and, in support thereof, respectfully show the following.

THE COURT'S OPINION HEREIN

On July 25, 1973, this Court entered its *per curiam* opinion granting the writ of certiorari sought by petitioners, and affirming the judgment of the United States Court of Appeals below. The case was decided without the submission of briefs or oral argument dealing with the questions presented on the merits of this case.

The Court's opinion concluded that the petitioner, Donald Fausner, a commercial airline pilot, was not entitled to deduct as an ordinary and necessary business expense any part of the cost of transporting a flight bag and overnight bag from his home to his place of employment and back again. The Court reasoned that §262[1], which denied any deduction for personal, living and family expenses, did apply to the transportation expenses involved, and no deduction should be allowable since the taxpayer incurred no "additional expenses" for transporting job-required tools and materials to and from work. The Court's opinion explained that no allocation of costs between personal and business expenses was feasible since no "additional expenses" were involved.

REASONS FOR GRANTING A HEARING

The rehearing requested by petitioners should be granted for two reasons:

1. The Court's opinion of June 25 enunciates a new "additional expense" rule which will unnecessarily disturb a large body of judicial and administrative authority which has long permitted individuals to deduct apportioned business expenses.

1. All section references are to the 1954 Internal Revenue Code, as amended.

2. It is believed that the Court would reverse the judgment below if afforded a full exposition of the arguments and authorities relevant to the "apportionment rule" heretofore adopted by the Courts of Appeals for the Second and Seventh Circuits.

I.

THE COURT'S OPINION OF JUNE 25 ENUNCIATES A NEW "ADDITIONAL EXPENSE" RULE WHICH WILL UNNECESSARILY DISTURB JUDICIAL AND ADMINISTRATIVE AUTHORITY PERMITTING THE ALLOCATION OF COSTS BETWEEN PERSONAL AND BUSINESS EXPENSES.

It seems likely that the Court's opinion of June 25 will unravel or warp much of the administrative and case-made authority so carefully woven in the "personal" versus "business" expense area. In that opinion the Court ruled that *"additional expenses may at time be incurred* for transporting job-required tools and material to and from work. *Then an allocation of costs between "personal" and "business" expenses may be feasible.* But no such allocation can be made here." (Emphasis supplied.)

Thus, the Court has indicated that allocation of costs in a personal-business context is feasible only where "additional expenses" are incurred. But such a requirement has never before been enunciated in the personal-business expense area, and a large body of administrative and decisional authority has upheld tax deductibility in analogous situations in the absence of proof of "additional expenses."

Examples where the allocation of expenses has been permitted are numerous, but include the following:

1. Allocation of home telephone installation and maintenance costs between personal and business use has been upheld where the telephone is used in part in taxpayer's business; this deduction has been allowable without a showing that "additional expenses" were incurred, and even though the taxpayer would have had a telephone in any case for personal reasons. *Louis M. Roth*, 17 T.C. 1450; *Robert H. Lee*, T.C. Memo, 1960-58, 19 T.C.M. 317.

2. Allocation of part of rent, heat, light, insurance, cleaning, depreciation, lawn care, snow removal, repairs and similar expenses has been allowed where the home is used in part in taxpayer's business without a showing that "additional expenses" have been incurred. Treasury Regulations §1.262-1; *Thelma C. Whitman*, T.C. Memo. 1960-88, 19 T.C.M. 456; *George R. Graves*, T.C. Memo. 1961-32, 20 T.C.M. 148.

3. Allocation of travel fares, meals and lodging costs is allowable without a showing that "additional expenses" have been incurred if a taxpayer travels to a destination and engages in both personal and business activities while on the trip. *R. E. Duncan*, 30 T.C. 386; Treasury Regulations §1.162-2(b)(1); Rev. Rul. 56-168, 1956-1 Cumulative Bulletin 93.

It is not perceived how any rational distinction can be drawn between allocating transportation expenses (which dually serve to transport the person and business tools or equipment), and telephone expenses (which dually serve to communicate personal messages and business messages). If the June 25 *Fausner* "additional expenses" rule is a sound interpretation of Congressional intent, then home telephone expenses should be wholly non-deductible even where a partial business use is shown. The "additional expenses" principle should apply by analogy to other

blended personal-business expenses as well. It is submitted that Congress has nowhere indicated such an intent, and in our view, that result is contrary to Congressional design in enacting §162.

II.

IT IS BELIEVED THAT THE COURT WOULD REVERSE THE JUDGMENT BELOW IF AFFORDED A FULL EXPOSITION OF ARGUMENTS AND AUTHORITIES RELEVANT TO THE APPORTIONMENT RULE

As has been indicated above, apportionment of expenses between non-deductible personal elements and deductible business elements has long been permitted in a great variety of situations. Apportionment of transportation expense between the non-deductible cost of commuting and the deductible cost of transporting tools and equipment, was first judicially allowed by the Tax Court in 1957 [2], and has since been permitted by the Courts of Appeal for the Second Circuit[3] and Seventh Circuit[4].

Here, without permitting briefs or oral argument directed to the merits of this question, the Court has swept aside carefully considered precedents in *Sullivan*, *Tyne*, and *Coker*.

2. *Charles Crowther*, 28 T.C. 1293 (1957), reversed on another ground, 269 F.2d 792 (9th Cir. 1959); *Francis Eaton*, 17 T.C.M. 60 (1958).

3. *Sullivan v. Commissioner*, 368 F.2d 1007 (C.A.2), after remand 69-2 U.S.T.C., par 9448 (C.A.2), certiorari denied, 396 U.S. 827; *Coker v. Commissioner*, Nos. 72-2309 and 73-1011, decided May 14, 1973.

4. *Tyne v. Commissioner*, 385 F.2d 40 (C.A.7), after remand, 409 F.2d 485 (C.A.7), certiorari denied, 396 F.2d U.S. 833, on remand 29 T.C.M. 198, affirmed, 468 F.2d 913 (C.A.7).

Taxpayers accustomed to the adversary system so basic to Anglo-American law are naturally mistrustful of judicial rules fashioned without the benefits afforded by adversary presentation; this mistrust is enhanced when familiar and generally understood rules of law are abruptly discarded.

It is hoped that the Court will grant a hearing and allow the merits of this important issue to be fully presented for consideration. It is our belief that such a thorough adversary presentation on the merits would persuade a majority of the Court to reconsider the wisdom of the "apportionment rule", and abandon the "additional expenses" principle enunciated in this Court's opinion of June 25.

CONCLUSION

For the forgoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment of the Court of Appeals for the Fifth Circuit be reversed.

Robert Edwin Davis

ROBERT EDWIN DAVIS
Counsel for Petitioners

CERTIFICATE OF COUNSEL

I, Robert Edwin Davis, counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Robert Edwin Davis

ROBERT EDWIN DAVIS
Counsel for Petitioners

CERTIFICATE OF SERVICE

It is hereby certified that service of this petition for rehearing has been made on all parties required to be served under Rule 33 of The Revised Rules of the Supreme Court by depositing their copies thereof on this 16th day of July, 1973, in an envelope, with air mail postage prepaid, addressed to him as follows:

HON. ERWIN N. GRISWOLD
Solicitor General
Department of Justice
Washington, D. C. 20230

Robert Edwin Davis

ROBERT EDWIN DAVIS

FAUSNER *v.* COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72–1396. Decided June 25, 1973

Airline pilot taxpayer is not entitled under § 262 of the Internal Revenue Code to an exclusion from "personal" expenses for the costs of commuting by car from his home to his place of employment because by happenstance he must carry incidentals of his occupation with him.

Certiorari granted; 472 F. 2d 561, affirmed.

PER CURIAM.

Petitioner Donald Fausner, a commercial airlines pilot, who regularly traveled by private automobile from his home to his place of employment and back again, a round trip of approximately 84 miles, sought to deduct the entire cost of commuting under § 162 (a) of the Internal Revenue Code of 1954, on the theory that his automobile expenses were incurred to transport his flight bag and overnight bag and thus constituted ordinary and necessary business expenses. It is not disputed that petitioner would have commuted by private automobile regardless of whether he had to transport his two bags. The Tax Court disallowed the deduction *in toto*. On appeal, the Court of Appeals for the Fifth Circuit affirmed the decision of the Tax Court. 472 F. 2d 561.

This issue has been addressed by two other circuits, *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (CA2 1966), and *Tyne* v. *Commissioner*, 385 F. 2d 40 (CA7 1967). Both of these circuits concluded that some allocable portion of the expenses incurred could be deducted as an ordinary and necessary business expense. The Court of Appeals for the Fifth Circuit refused to follow those cases on the

ground that there was no rational basis for any allocation between the nondeductible commuting component and the deductible business component of the total expense.

As the Court of Appeals indicated, Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense. We cannot read § 262 of the Internal Revenue Code [1] as excluding such expense from "personal" expenses because by happenstance the taxpayer must carry incidentals of his occupation with him. Additional expenses may at times be incurred for transporting job-required tools and material to and from work.[2] Then an allocation of costs between "personal" and "business" expenses [3] may be feasible. But no such allocation can be made here.

We grant the petition for certiorari and affirm the judgment below.

MR. JUSTICE BLACKMUN would grant the petition for a writ of certiorari and set the case for oral argument.

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[1] "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." 26 U. S. C. § 262.

[2] See Rev. Rul. 63–100, 1963–1 Cum. Bull. 34.

[3] Sec. 162 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 162 (a).